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SAN BERNARDINO and SAMUEL
7 FULLER

8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

10
11 GALE SOSTEK; and HERB SOSTEK,
12 Plaintiffs,
13 vs.
14 COUNTY OF SAN BERNARDINO;
and DOES 1-10, inclusive,
15 Defendants.
16

Case No. 5:23-cv-02236-MRA (MRWx)

**DEFENDANT'S MEMORANDUM
OF CONTENTIONS OF FACT AND
LAW**

FPTC January 8, 2025
Trial Date: January 28, 2025

17 **TO THE HONORABLE COURT, ALL INTERESTED PARTIES, AND**
18 **TO THEIR COUNSEL OF RECORD:**

19 Pursuant to Local Rule 16-4, Defendants COUNTY OF SAN BERNARDINO
20 and SAMUEL FULLER (collectively, "Defendants") submit their Memorandum of
21 Contentions of Fact and Law.

22 ///

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MEMORANDUM OF CONTENTIONS OF FACT AND LAW

I. FACTUAL CONTENTIONS

This matter involves a March 12, 2023, office involved lethal force encounter with Kyle Sostek ("decedent"), who was 34 at the time.

On March 11, 2023, the Big Bear Sheriff's Station personnel conducted their pre-shift briefing. Deputy Samuel Fuller was present at the briefing, as was Sgt. Everman. During the briefing, information regarding a felony arrest warrant for Kyle Sostek was discussed. The arrest warrant indicated that the decedent was an armed and dangerous parolee at large. He was known to drive a white Honda Civic, with a distinctive tear drop decal.

On March 12, 2023, at approximately 1:57 a.m., Deputy Samuel Fuller located the decedent's vehicle near the intersection of Big Bear Blvd. and Green Way, in the City of Big Bear. Deputy Fuller attempted to initiate a traffic enforcement stop. The decedent failed to yield, and a vehicle pursuit ensued. The vehicle pursuit passed by an accident scene where Sgt. Everman was conducting an investigation. Sgt. Everman discontinued the accident investigation and followed behind Deputy Fuller and requested a helicopter.

The vehicle pursuit continued for approximately seven minutes. The decedent was driving recklessly blowing through multiple stop signs and driving at a high rate of speed, given weather conditions. The decedent turned down an unlit dead-end street in the community of Sugarloaf, terminating the vehicle pursuit. The audio recording of Deputy Fuller indicates that a foot pursuit began and within less than 20 seconds shots were fired.

01: Male: See what happens here.

04: Dispatch: 10-4

06: Dep. Fuller: (unintelligible) f@ @ @ing hands.

07: Decedent: (unintelligible)

08: Dep. Fuller: Back up!

1 08: Decedent: (unintelligible) jail.
2 09: Dep. Fuller: Back up!
3 10: Male: (unintelligible) weapons.
4 10: Dep. Fuller Back up!
5 13: Decedent: I just (unintelligible.)
6 13: Dep. Fuller: Back up, Turn around!
7 14: Decedent: You, I just (unintelligible)
8 15:-16: Gunshots fired.
9

10 Sgt. Everman was approximately 50 yards behind Deputy Fuller's patrol
11 vehicle when he saw the decedent's Honda stop at the dead end of the street. Deputy
12 Fuller stopped right behind the decedent's vehicle. Sgt. Everman closed the distance
13 as quickly as possible and stopped approximately 20 to 50 feet behind Deputy Fuller's
14 vehicle. Before Sgt. Everman could exit the vehicle, both Deputy Fuller and the
15 decedent opened their car doors and exited their vehicles. The decedent looked huge
16 and towered over Deputy Fuller and took almost a run toward Deputy Fuller and his
17 patrol vehicle. Sgt. Everman could hear Deputy Fuller and the decedent yelling
18 something, but he could not hear what was being said because the patrol siren was on.
19 Within five seconds of the decedent exiting his vehicle, he had already run passed the
20 open driver's door of Deputy Fuller's patrol car and was within arm's reach of Deputy
21 Fuller who was backing up to behind his patrol car. Deputy Fuller had out his
22 handgun, Sgt. Everman drew his taser since Deputy Fuller already had the decedent
23 covered with lethal force. Sgt. Everman could not get a good line of sight on the
24 decedent and as he ran toward the back of Deputy Fuller, he heard shots fire.

25 Sgt. Everman grabbed the decedent and guided him to the ground. He grabbed
26 the decedent's hands and looked for a weapon, and none was seen in his hands. After
27 he guided the decedent to the ground, Sgt. Everman activated his audio recording and
28 asked Deputy Fuller to search the decedent. No weapons were found on the decedent.

1 Sgt. Everman began CPR and first aid when the decedent stopped breathing. Sgt.
2 Everman did chest compressions for approximately 15 minutes before medical
3 assistance arrived. Kyle Sostek succumbed to his injuries.

4 Pursuant to California Assembly Bill 1506 (AB 1506), the California
5 Department of Justice (DOJ) is required to investigate all incidents of an officer-
6 involved shooting resulting in the death of an unarmed civilian in the state.
7 Historically, these critical incidents in California had been primarily handled by local
8 law enforcement agencies and the state's 58 district attorneys. However, beginning
9 on July 1, 2021, AB 1506 mandates that independent, statewide prosecutor investigate
10 and review officer-involved shootings of unarmed civilians and review for potential
11 liability. The DOJ is not required to complete its investigations within any particular
12 timeframe. The California Department of Justice is investigating the shooting
13 because Sostek was unarmed. On advice of counsel, and because of the ongoing
14 investigation, Deputy Fuller has elected to rely upon his Fifth Amendment privilege
15 and not to provide testimony about the incident while the investigation is ongoing. It
16 is anticipated he will continue to assert his Fifth Amendment privilege during trial in
17 this matter.

18 **II. CLAIMS AND DEFENSES (L.R. 16-4.1)**

19 Plaintiffs' First Amended Complaint (Dkt. 33) is the operative pleading in this
20 action. Defendants filed their answer to the FAC on April 3, 2024. (Dkt. 38.)

21 **(a) Plaintiff's Claims (L.R. 16-4.1 (a)).**

22 (1) Claim 1: Unreasonable Search and Seizure – 42 U.S.C. §1983 against
23 Defendant Samuel Fuller; and

24 (2) Claim 2: Unreasonable Search and Seizure – Denial of Medical Care (42
25 U.S.C. §1983) against Defendant Samuel Fuller;

26 (3) Claim 3: Substantive Due Process Violation – (42 U.S.C. §1983) against
27 Defendant Samuel Fuller;

28 (4) Claim 4: Battery (survival and wrongful death) against Defendants Fuller

1 and the County;

2 (5) Claim 5: Negligence (survival and wrongful death) against Defendants
3 Fuller and the County;

4 (6) Claim 6: Violation of Bane Act (Cal. Civil Code §52.1) against
5 Defendants Fuller and the County.

6 (b) **Elements Required to Establish Plaintiff's Claims (L.R. 16-4.1 (b))**

7 (1) Elements Required to Establish Plaintiff's Claim for Unreasonable
8 Search and Seizure – 42 U.S.C. §1983

9 (i) That Deputy Fuller acted under color of state law;

10 (ii) That Deputy Fuller's shooting of Kyle Sostek was not objectively
11 reasonable from the perspective of a reasonable officer; and

12 (iii) The shooting of Kyle Sostek by Deputy Fuller deprived the Kyle
13 Sostek of his particular rights under the laws of the United States Constitution.

14 (See, Ninth Circuit Manual of Model Jury Instructions: Civil §9.3 & §9.25,
15 (2017), revised 2024.)

16 (2) Elements Required to Establish Plaintiff's Claim for Unreasonable
17 Search and Seizure – Denial of Medical Care – 42 U.S.C. §1983

18 (i) Deputy Fuller made an intentional decision regarding the denial of
19 needed medical care;

20 (ii) The denial of needed medical care put the Decedent at substantial risk of
21 suffering serious harm; and

22 (iii) Deputy Fuller did not take reasonable available measures to abate or
23 reduce the risk of serious harm, even though a reasonable officer under the
24 circumstances would have understood the high degree of risk involved – making the
25 consequences of Deputy Fuller's conduct obvious; and

26 (iv) By not taking such measures Defendant Fuller caused the Decedent's
27 injuries.

28 (See, Ninth Circuit Manual of Model Jury Instructions: Civil § 9.30 (2017),

revised 2024.)

(3) Elements Required to Establish Plaintiff's Claim for Substantive Due Process Violation – (42 U.S.C. §1983)

(i) Whether Deputy Fuller acted with a “purpose to harm” the victim for reasons unrelated to legitimate law enforcement objectives; or

(ii) Whether Deputy Fuller acted with “deliberate indifference” to the decedent.

(See, Ninth Circuit Manual of Model Jury Instructions: Civil § 9.32 (2017), revised 2024.)

(4) Elements Required to Establish Plaintiff's Claim for Battery (survival and wrongful death)

(i) Whether Deputy Fuller intentionally touched Kyle Sostek or caused Kyle Sostek to be touched;

(ii) That Deputy Fuller's used deadly force on Kyle Sostek;

(iii) That Deputy Fuller's use of deadly force was not necessary to defend human life;

(iv) That Kyle Sostek was killed;

(v) That Deputy Fuller's use of deadly force was a substantial factor in causing Kyle Sostek's death.

(See, CACI No. 1305B. Battery by Peace Officer (Deadly Force) – Essential Factual Elements.)

(5) Elements Required to Establish Plaintiff's Claim for Negligence (survival and wrongful death)

(i) That Deputy Fuller was a peace officer;

(ii) That Deputy Fuller used deadly force on Kyle Sostek;

(iii) That Deputy Fuller's use of deadly force was not necessary to defend human life;

(iv) That Deputy Fuller's use of deadly force was a substantial factor in

1 causing Kyle Sostek's death.

2 (See, CACI No. 441. Negligent Use of Deadly Force by Peace Officer –
3 Essential Factual Elements.)

4 (6) Elements Required to Establish Plaintiff's Claim for Violation of Bane
5 Act (Cal. Civil Code §52.1)

6 (i) Deputy Fuller acted violently or coercively against Kyle Sostek to
7 prevent him from exercising some constitutional right or retaliated against him for
8 having exercised some constitutional right;

9 (ii) That Deputy Fuller intended to deprive Kyle Sostek of his enjoyment of
10 the interest protected by the U.S. Constitution;

11 (iii) That Kyle Sostek was harmed; and

12 (iv) That Deputy Fuller's conduct was a substantial factor in causing the
13 harm.

14 (See, CACI 3066. Bane Act – Essential Factual Elements (Civ. Code §52.1).)

15 (c) Summary of Key Facts and Evidence in Opposition to Plaintiff's
16 Claims (L.R. 16-4.1 (c).)

17 **Claim 1: Fourth Amendment Excessive Force (42 U.S.C. §1983)**

18 In assessing a claim of excessive force, the jury should consider the three non-
19 exclusive factors set forth by the Supreme Court in *Graham v. Connor*. See
20 *Williamson v. City of Nat'l City*, 23 F.4th 1146, 1121 (9th Cir. 2022). These factors
21 are commonly referred to as *Graham* factors. The three Graham factors are: (1) the
22 severity of the crime at issue; (2) whether the individual posed an immediate threat to
23 the safety of the officers or others; and (3) whether the individual was actively
24 resisting arrest or attempting to evade arrest by flight. *Graham v. Connor*, 490 U.S.
25 386, 396 (1989). The Ninth Circuit has repeatedly emphasized that “the most
26 important *Graham* factor” is whether the individual posed an immediate threat to the
27 safety of the officers or others. *Mattos v. Agarano*, 661 F.3d 433, 441 (9th Cir. 2011)
28 (en banc) (internal quotation marks omitted).

1 In *Graham v. Connor*, the United States Supreme Court held that “[o]ur Fourth
2 Amendment jurisprudence has long recognized that the right to make an arrest or
3 investigatory stop necessarily carries with it the right to use some degree of physical
4 coercion or threat thereof to effect it.” (*Graham*, 490 U.S. at 396.) “[A]ll claims that
5 law enforcement have used excessive force—deadly or not—in the course of an arrest,
6 investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the
7 Fourth Amendment and its ‘reasonableness’ standard...” (Id. at 395.)

8 “Because the test of reasonableness under the Fourth Amendment is not
9 capable of precise definition or mechanical application, however, its proper
10 application requires careful attention to the facts and circumstances of each particular
11 case, including the severity of the crime at issue, whether the suspect poses an
12 immediate threat to the safety of the officers or others, and whether he is actively
13 resisting arrest or attempting to evade arrest by flight.” (Id. at 396 (citation omitted);
14 emphasis added.) “The ‘reasonableness’ of a particular use of force must be judged
15 from the perspective of a reasonable officer on the scene, rather than with the 20/20
16 vision of hindsight.” (Id. at 396.) “The calculus of reasonableness must embody
17 allowance for the fact that police officers are often forced to make split-second
18 judgments—in circumstances that are tense, uncertain, and rapidly evolving—about
19 the amount of force that is necessary in a particular situation.” (Id. at 396-97.)

20 Based on the totality of the circumstances, Deputy Fuller acted in an objectively
21 reasonable manner. the decedent was known to be armed and dangerous (the criminal
22 record confirms this) and that the decedent "almost ran" toward Deputy Fuller and
23 ignored commands to back up. The decedent was also a large man, 5'10" tall and 300
24 pounds. The decedent was running up on the snow embankment toward Deputy
25 Fuller, giving him another approximate 18 inches of height. The decedent's "almost
26 run" toward Deputy Fuller and ignoring the commands to back up could arguably
27 create a reasonable belief in Deputy Fuller's mind that the decedent posed an imminent
28

1 threat to Deputy Fuller's safety. Further, Deputy Fuller was aware that the decedent
2 was a known felon who was considered armed and dangerous.

3 **Claims 2 and 3: Fourteenth Amendment, Denial of Medical Care**
4 **and Interference with Familial Relations (42 U.S.C. §1983)**

5 Plaintiffs make claims for Denial of Medical Care and Interference with
6 Familial Relations pursuant to the Fourteenth Amendment. The Amendment states in
7 relevant part that "[n]o State shall ... deprive any person of life, liberty, or property,
8 without due process of law." U.S. Const. amend. XIV, § 1. A claimant asserting that
9 police officers violated this Fourteenth Amendment right during a police shooting
10 must show that the officers' conduct "shocks the conscience." *Porter v. Osborn*, 546
11 F.3d 1131, 1137 (9th Cir. 2008). There are two tests used to decide whether officers'
12 conduct "shocks the conscience"; which test applies turns on whether the officers had
13 time to deliberate their conduct.

14 The deliberate-indifference test applies if the situation at issue "evolve[d] in a
15 time frame that permits the officer to deliberate before acting." *Porter*, 546 F.3d at
16 1137. Deliberation is not possible if the officers "encounter[ed] fast paced
17 circumstances presenting competing public safety obligations." *Id.* at 1139.
18 Deliberation in this context "should not be interpreted in the narrow, technical sense."
19 *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010).

20 Deputy Fuller had less than 20 seconds to assess the situation at hand. Kyle
21 Sostek, was known to be armed and dangerous, stopped and exited his car at a dead
22 end and unlit street. Sostek then ran from his car toward Deputy Fuller and ignored
23 commands to back up and turn around. Deputy Fuller's decision to use deadly force
24 was objectively reasonable under the circumstances.

25 Medical assistance was requested within 16 seconds of the shots fired report to
26 dispatch. Sgt. Everman began administering first aid and chest compressions and
27 continued to do so until medical personnel arrived 15 minutes later.

28

Claims (4 & 5) Battery and Negligence

The state claims for battery and negligence fail as a matter of law because the deadly force used by Deputy Fuller was reasonable under the circumstances. For the same reasons that no constitutional violations were committed, no state torts were committed, either, so the negligence and battery claims fail as a matter of law. (See *Martinez v. County of Los Angeles* (1996) 47 Cal. App. 4th 334, 349-50.)

Under California law a claim against a law enforcement officer for battery, assault, negligence, or wrongful death - courts must apply the *Graham* reasonableness standard. (See *Hayes v. Cnty. of San Diego* (2013) 57 Cal. 4th 622, 632. To the extent Plaintiffs base the negligence claim on pre-shooting tactics, liability can only arise if the tactical conduct and decisions leading up to the use of deadly force show, as part of the totality of the circumstances, that the use of deadly force was unreasonable. (*Hayes, supra*, 57 Cal. 4th at 626.) Additionally, California law holds that a peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape, or to overcome resistance. (See Cal. Penal Code § 835a; *Edson, supra*, 63 Cal.App.4th at 1272-1273.)

Because Deputy Fuller's conduct was objectively reasonable he cannot be liable on the state claims for negligence and battery.

Claim (7) Violation of Bane Act Violation

As stated by the California Supreme Court, “[t]he Legislature enacted [Civil Code] section 52.1 to stem a tide of hate crimes.” (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338.) Civil Code, section 52.1 requires “an attempted or completed act of interference with a legal right, accompanied by a form of coercion.” (*Id.* at 334.) To obtain relief under Civil Code, section 52.1, a plaintiff need not allege the defendant acted with discriminatory animus or intent; a defendant is liable if he or she interfered with the plaintiffs' constitutional rights by the requisite threats, intimidation, or coercion. (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820,

1 841-843.) The word “interferes” as used in the Bane Act means “violates.” (See *Jones*,
2 *supra*, 17 Cal.4th at 338 [California Supreme Court equates interfere” with “violate”];
3 *City of Simi Valley v. Superior Court* (2003) 111 Cal.App.4th 1077 [same].)

4 There is no Constitutional right to not cooperate with law enforcement's lawful
5 arrest. Kyle Sostek failed to pull over during the vehicle pursuit and when he drove
6 down a dead end and unlit street he exited his vehicle and ran at Deputy Fuller and
7 ignored orders to back up and turn around. Deputy Fuller attempted to back up but
8 Kyle Sostek continued to advance on him. Deputy Fuller only used deadly force when
9 Sostek refused to cooperate and charge at Deputy Fuller. As such, Deputy Defendant
10 Fuller did not violate Kyle Sostek's Constitutional rights.

11 **(c) Key Evidence in Opposition to All Plaintiff's Claims (L.R. 16-4.1(c).)**

12 **Witnesses:**

13 Parties:

- 14 • Plaintiffs Gale Sostek
- 15 • Plaintiff Herbert Sostek
- 16 • Defendant Samuel Fuller;

17 Experts:

- 18 • Ed Flosi.

19 Percipient Witnesses:

20 Sergeant John Everman
21 Chanikarn Lopez, M.D.
22 Deputy Chief John Walker
23 Deputy David Bush
24 Captain Joseph Janowicz
25 Captain Kelly Craig
26 Lieutenant Timothy Jackson
27 Sergeant Jon Woods
28 Detective Malcolm Page

- 1 Detective Travis Gagne
- 2 Detective Justin Carty
- 3 Detective Eric Ogaz
- 4 Detective Derek Pedersen
- 5 Crime Scene Investigator Andrea Guerrero
- 6 Crime Scene Investigator Mike Russ
- 7 Lauren Torres – Crime Analyst
- 8 Special Agent Supervisor Samuel Richardson
- 9 Special Agent Jon Genes
- 10 Special Agent Tony Baca
- 11 Fire Department – Captain/Paramedic Mitch Hollenbaugh
- 12 Fire Department – Engineer Jon Bidwell
- 13 Fire Department – Paramedic Brittania Huether
- 14 Ambulance – Tyler Guyon
- 15 Ambulance – Cameron Dupre
- 16 Madaline Rivera
- 17 Diane Bilodeau
- 18 Christopher Edwards
- 19 Kaci Dement
- 20 Blake Stebbing
- 21 Robert Maestas
- 22 Timothy Bolin
- 23 Andrew Alas
- 24 James Jones
- 25 Kyle Gober
- 26 Witness - Lindy Barr
- 27 Witness - Norma Fuentes
- 28 Witness - Bryan Castello

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1 Witness - Marilou Fuentes

2 Witness - James Stein

3 Witness - Ethan Richardson

4 **Evidence:**

5 1. Homicide Report SBD-00001-641

6 2. Audio Recording titled "PUMA5203"

7 3. Audio Recording titled "PUMA5204"

8 4. Audio Recording titled "PUMA0895"

9 5. Audio Recording titled "PUMA0896"

10 6. Audio Recording titled "PUMA0898"

11 7. Audio Recording titled "PUMA0900"

12 8. Audio Recording titled "PUMA0902"

13 9. Audio Recording titled "S2190567"

14 10. Audio Recording titled "Engineer Paramedic Cameron Dupre

15 Interview"

16 11. Audio Recording titled "Engineer Paramedic Jonathan Bidwell

17 Interview"

18 12. Audio Recording titled "FF Paramedic Brittania Huether Interview"

19 13. Audio Recording titled "Fire Capt. Mitch Hollenbaugh Interview"

20 14. Audio Recording titled "Gale and Herbert Sostek phone contact"

21 15. Audio Recording titled "Paramedic Tyler Guyon Interview"

22 16. Audio Recording titled "Sgt. John Everman Interview"

23 17. Audio Recording titled "PUMA5204(reduced siren)"

24 18. Audio Recording titled "F8549626"

25 19. Audio Recording titled "F8549627"

26 20. Audio Recording titled "Gale Sostek 3.23.2023 phone call"

27 21. Audio Recording titled "Gale Sostek 3.23.2023 voice mail message"

28 22. Audio Recording titled "Gale Sostek 3.27.23 Phone Call"

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- 1 23. Audio Recording titled "BB230550009 Ec09- domestic 9-1-1 call"
- 2 24. Audio Recording titled "BB230710005 SPR2300025 FTY UOF VCC
- 3 5"
- 4 25. Video File titled "7f6BQ3UsP"
- 5 26. Video File titled "Outside 1"
- 6 27. Video File titled "Outside 2"
- 7 28. Video File titled "Register 2"
- 8 29. 629 Photographs taken in the connection with the Incident SBD-
- 9 000642-1270;
- 10 30. Criminal History of Decedent
- 11 31. Medical Records for the Decedent
- 12 32. Coroner Report/Investigation SBD-002380-2386
- 13 33. Autopsy Report and Photographs SBD-002368-2379
- 14 34. Sheriff's Department policies and training regarding the use of deadly
- 15 force
- 16 35. Medical records from the Paramedics / Firefighters / Ambulance
- 17 36. Audio Recording Titled "Phone call to Attorney Leap – 230705_1406".
- 18 37. DOJ Physical Evidence Examination Report
- 19 38. DOJ Physical Evidence Submission Form
- 20 39. DOJ Photos of sealed evidence packages
- 21 40. Phone Extraction
- 22 41. FARO Files
- 23 42. Gunshot Residue Test Results
- 24 43. POST Learning Domain 20 SBD-002254-2367
- 25 44. San Bernardino County Sheriff Department Manual SBD-001271
- 26 45. Exhibit A to the Deposition Transcript of Dr. Chanikarn Lopez
- 27 46. Exhibit 1 to Deposition Transcript of Gale Sostek
- 28 47. Exhibit 1 to Deposition Transcript of Herb Sostek

1 48. Plaintiff Herb Sosteks Responses and Objections to Special
2 Interrogatories, Set One

3 49. Plaintiff Gail Sosteks Responses and Objections to Special
4 Interrogatories, Set One

5 50. Plaintiff Herb Sosteks Responses and Objections to Request for
6 Production, Set One

7 51. Plaintiff Gail Sosteks Responses and Objections to Request for
8 Production, Set One

9 52. Plaintiff Herb Sosteks Responses and Objections to Request for
10 Production, Set Two

11 53. Plaintiff Gail Sosteks Responses and Objections to Request for
12 Production, Set Two

13 54. Plaintiff Gail Sosteks Responses and Objections to Special
14 Interrogatories, Set Two

15 55. Plaintiff Herb Sosteks Responses and Objections to Requests for
16 Admissions, Set One

17 56. Plaintiff Herb Sosteks Responses and Objections to Requests for
18 Production, Set Three

19 **(d) Defendants' Affirmative Defenses (L.R. 16-4.1 (d))**

20 1. Fifth Affirmative Defense – Comparative Fault

21 **(e) Defendants' Elements to Establish Affirmative Defenses (L.R. 16-**
22 **4.1 (e))**

23 1. Fifth Affirmative Defense – Comparative Fault

24 (i) That Kyle Sostek was negligent;

25 (ii) That Kyle Sostek's negligence was a substantial factor in causing his
26 harm.

27 (See, CACI 405)

28 **(f) Key Evidence and Facts Relied Upon In Support of Affirmative**

1 **Defenses (L.R. 16-4.1 (f))**

2 Defendants will rely upon the same testimony of witnesses on the Joint
3 Proposed Witness list, and as identified and detailed above in section (c) Key
4 Evidence in Opposition to All Plaintiff's Claims for their affirmative defenses.

5 As detailed above, Kyle Sostek failed to pull over during the vehicle pursuit
6 and when he drove down a dead end and unlit street he exited his vehicle and ran at
7 Deputy Fuller and ignored orders to back up and turn around. Deputy Fuller
8 attempted to back up but Kyle Sostek continued to advance on him. Deputy Fuller
9 only used deadly force when Sostek refused to cooperate and charge at Deputy Fuller.

10 **Parties:**

- 11 • Plaintiffs Gale Sostek
12 • Plaintiff Herbert Sostek
13 • Defendant Samuel Fuller;

14 **Experts:**

- 15 • Ed Flosi.

16 **Percipient Witnesses:**

17 Sergeant John Everman
18 Chanikarn Lopez, M.D.
19 Deputy Chief John Walker
20 Deputy David Bush
21 Captain Joseph Janowicz
22 Captain Kelly Craig
23 Lieutenant Timothy Jackson
24 Sergeant Jon Woods
25 Detective Malcolm Page
26 Detective Travis Gagne
27 Detective Justin Carty
28 Detective Eric Ogaz

- 1 Detective Derek Pedersen
- 2 Crime Scene Investigator Andrea Guerrero
- 3 Crime Scene Investigator Mike Russ
- 4 Lauren Torres – Crime Analyst
- 5 Special Agent Supervisor Samuel Richardson
- 6 Special Agent Jon Genes
- 7 Special Agent Tony Baca
- 8 Fire Department – Captain/Paramedic Mitch Hollenbaugh
- 9 Fire Department – Engineer Jon Bidwell
- 10 Fire Department – Paramedic Britannia Huether
- 11 Ambulance – Tyler Guyon
- 12 Ambulance – Cameron Dupre
- 13 Madaline Rivera
- 14 Diane Bilodeau
- 15 Christopher Edwards
- 16 Kaci Dement
- 17 Blake Stebbing
- 18 Robert Maestas
- 19 Timothy Bolin
- 20 Andrew Alas
- 21 James Jones
- 22 Kyle Gober
- 23 Witness - Lindy Barr
- 24 Witness - Norma Fuentes
- 25 Witness - Bryan Castello
- 26 Witness - Marilou Fuentes
- 27 Witness - James Stein
- 28 Witness - Ethan Richardson

Evidence:

1. Homicide Report SBD-00001-641
2. Audio Recording titled "PUMA5203"
3. Audio Recording titled "PUMA5204"
4. Audio Recording titled "PUMA0895"
5. Audio Recording titled "PUMA0896"
6. Audio Recording titled "PUMA0898"
7. Audio Recording titled "PUMA0900"
8. Audio Recording titled "PUMA0902"
9. Audio Recording titled "S2190567"
10. Audio Recording titled "Engineer Paramedic Cameron Dupre Interview"
11. Audio Recording titled "Engineer Paramedic Jonathan Bidwell Interview"
12. Audio Recording titled "FF Paramedic Brittania Huether Interview"
13. Audio Recording titled "Fire Capt. Mitch Hollenbaugh Interview"
14. Audio Recording titled "Gale and Herbert Sostek phone contact"
15. Audio Recording titled "Paramedic Tyler Guyon Interview"
16. Audio Recording titled "Sgt. John Everman Interview"
17. Audio Recording titled "PUMA5204(reduced siren)"
18. Audio Recording titled "F8549626"
19. Audio Recording titled "F8549627"
20. Audio Recording titled "Gale Sostek 3.23.2023 phone call"
21. Audio Recording titled "Gale Sostek 3.23.2023 voice mail message"
22. Audio Recording titled "Gale Sostek 3.27.23 Phone Call"
23. Audio Recording titled "BB230550009 Ec09- domestic 9-1-1 call"
24. Audio Recording titled "BB230710005 SPR2300025 FTY UOF VCC 5"

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29 ORCHARD ROAD
LAKE FOREST, CALIFORNIA 92630
(949) 975-1000

- 1 25. Video File titled "7f6BQ3UsP"
- 2 26. Video File titled "Outside 1"
- 3 27. Video File titled "Outside 2"
- 4 28. Video File titled "Register 2"
- 5 29. 629 Photographs taken in the connection with the Incident SBD-
- 6 000642-1270;
- 7 30. Criminal History of Decedent
- 8 31. Medical Records for the Decedent
- 9 32. Coroner Report/Investigation SBD-002380-2386
- 10 33. Autopsy Report and Photographs SBD-002368-2379
- 11 34. Sheriff's Department policies and training regarding the use of deadly
- 12 force
- 13 35. Medical records from the Paramedics / Firefighters / Ambulance
- 14 36. Audio Recording Titled "Phone call to Attorney Leap – 230705_1406".
- 15 37. DOJ Physical Evidence Examination Report
- 16 38. DOJ Physical Evidence Submission Form
- 17 39. DOJ Photos of sealed evidence packages
- 18 40. Phone Extraction
- 19 41. FARO Files
- 20 42. Gunshot Residue Test Results
- 21 43. POST Learning Domain 20 SBD-002254-2367
- 22 44. San Bernardino County Sheriff Department Manual SBD-001271
- 23 45. Exhibit A to the Deposition Transcript of Dr. Chanikarn Lopez
- 24 46. Exhibit 1 to Deposition Transcript of Gale Sostek
- 25 47. Exhibit 1 to Deposition Transcript of Herb Sostek
- 26 48. Plaintiff Herb Sosteks Responses and Objections to Special
- 27 Interrogatories, Set One
- 28 49. Plaintiff Gail Sosteks Responses and Objections to Special

1 Interrogatories, Set One

2 50. Plaintiff Herb Sosteks Responses and Objections to Request for
3 Production, Set One

4 51. Plaintiff Gail Sosteks Responses and Objections to Request for
5 Production, Set One

6 52. Plaintiff Herb Sosteks Responses and Objections to Request for
7 Production, Set Two

8 53. Plaintiff Gail Sosteks Responses and Objections to Request for
9 Production, Set Two

10 54. Plaintiff Gail Sosteks Responses and Objections to Special
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15 Production, Set Three

16 (g) **Similar Statement for All Third Parties (L.R. 16-4.1 (g))**

17 Not applicable.

18 (h) **Identification of any anticipated evidentiary issues, together with**
19 **the party's position on those issues (L.R. 16-4.1 (h))** .

20 Defendants have filed two Motions in Limine to exclude:

21 1. Testimony of Plaintiffs' retained expert Scott Defoe

22 2. Testimony of Plaintiffs' retained expert Bennet I. Omalu

23 (i) **Identification of any issues of law, which are germane to the case**
24 **and party's position (L.R. 16-4.1 (i))**.

25 **III. BIFURCATION OF ISSUES (L.R. 16-4.3)**

26 Defendants request the Court bifurcate the trial into two phases as follows:
27 Phase 1 - liability phase as to the Defendants; and Phase 2 - punitive damages, for the
28 Individual Deputy Defendant, if necessary.

"Rule 42(b) does not set a high standard for the court[.]" *Gilbert v. State Farm Mut. Auto. Ins. Co.*, 311 F.R.D. 685, 686 (M.D. Fla. 2015). The predominant consideration is whether separate trial of any issue will better promote a fair and impartial trial "through a balance of benefits and prejudice." *Medtronic Xomed, Inc. v. Gyrus ENT LLC*, 440 F.Supp.2d 1333, 1334 (M.D. Fla. 2006). Factors to be considered in deciding whether to order separate trials include: avoiding prejudice, the ease with which issues may be tried separately, convenience, judicial economy, and risk of confusion. *Bates v. United Parcel Service*, 204 F.R.D. 440, 448 (N.D. Cal. 2001). Other factors to be considered include: complexity of the issues, factual proof, and the possibility that the first trial may be dispositive of the case. *Calmar, Inc. v. Emson Research, Inc.*, 850 F.Supp. 861, 866 (C.D. Cal. 1994).

In this case, all of those factors weigh heavily in favor of a two-phase trial, as discussed below.

A. Punitive Damages are Separately Tried as a Matter of Course in Section 1983 Cases Such as This.

"[C]ourts trying Section 1983 cases in this circuit often bifurcate the punitive damages issue." *Monroe v. Griffin*, 2015 WL 5258115, at *5 (N.D. Cal. 2015). Indeed, in managing the proceedings before them, courts often order separate trial of punitive damages sua sponte. *Saenz v. Reeves*, 2013 WL 2481733, at *1 (E.D. Cal. 2013).

Defendants therefore request that the trial phase as to the award of punitive damages and introduction of evidence relating to Defendant's financial condition, be delayed until after the issues of liability and compensatory damages have been tried.

IV. JURY TRIAL (L.R. 16-4.4)

Both the Plaintiff and Defendants have made timely demands for a jury trial on all issues, as required by the Fed. R. Civ. P., Rule 38.

V. ATTORNEYS' FEES (L.R. 16-4.5)

Defendant contends that these fees are not recoverable as Plaintiffs cannot maintain any of their causes of action against Defendants.

1 The award of attorneys' fees for Plaintiff's causes of action are a matter of
2 discretion for the Court.

3 The Civil Rights Attorney's Fee Award Act of 1976, 42 USC Sec. 1988, allows
4 a court, in its discretion, to award reasonable attorneys' fees as part of costs to a
5 prevailing party in federal civil rights lawsuits, including cases brought under 42 USC
6 1983.

7 **VI. ABANDONMENT OF ISSUES (L.R. 16-4.6)**

8 Defendants have abandoned its affirmative defenses not identified in section
9 L.R. 16-4.1 (e) above.

10
11 DATED: December 11, 2024

WESIERSKI & ZUREK LLP

Christopher P. Wesierski

12
13
14 By: _____

15 CHRISTOPHER P. WESIERSKI
16 Attorneys for Defendant, COUNTY OF
17 SAN BERNARDINO and SAMUEL
18 FULLER
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